

**** § 362 INFORMATION SHEET ****JILL WHITTLE
DEBTORCase No: 10-30897-BAM

MOTION #: _____

APPLE BLOSSOM ARBITRAGE, LLC
MOVANT

CHAPTER: 13

Certification of Attempt to Resolve the Matter Without Court Action:*Moving counsel hereby certifies that pursuant to the requirements of LR 4001(a)(3), an attempt has been made to resolve the matter without court action, but movant has been unable to do so.*Date: 12/02/2010Signature: /s/ Edgar C. Smith
Attorney for MovantPROPERTY INVOLVED IN THIS MOTION: 646 Paloma Drive, Boulder City, Nevada 89005NOTICE SERVED ON: Debtors X; Debtors' Counsel X; Trustee X;DATE OF SERVICE: 12/2/2010**MOVING PARTY'S CONTENTIONS:**

The EXTENT and PRIORITY of LIENS:

1st \$ -N/A-

2nd \$ _____

3rd _____

4th _____

Other: _____

Total Encumbrances: \$ _____

APPRAISAL of OPINION as to VALUE:

\$ _____

DEBTORS' CONTENTIONS:

The EXTENT and PRIORITY of LIENS:

1st _____

2nd _____

3rd _____

4th _____

Other: _____

Total Encumbrances: _____

APPRAISAL of OPINION as to VALUE:

**TERMS of MOVANT'S CONTRACT
with the DEBTORS**Amount of Note: \$ - N/A-

Interest Rate: _____

Duration: _____

Payment per Month: \$ _____

Date of Default: _____

Amount in Arrears: \$ _____

Date of Notice of Default: _____

SPECIAL CIRCUMSTANCES:

Movant acquired title pre-petition and Debtor's
right to possession expired pre-petition.SUBMITTED BY: Edgar C. Smith, Esq.SIGNATURE: /s/ Edgar C. Smith**DEBTOR'S OFFER of
"ADEQUATE PROTECTION" for MOVANT:**.
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SPECIAL CIRCUMSTANCES:

SUBMITTED BY: _____

SIGNATURE: /s/ _____

E-FILED DECEMBER 2, 2010

Edgar C. Smith, Esq.
Nevada Bar No. 5506
LAW OFFICE OF EDGAR C. SMITH
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Las Vegas, Nevada 89128
Telephone: (702) 388-0040

Attorney for Movant Apple Blossom Arbitrage, LLC

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:
JILL WHITTLE,
Debtor.

APPLE BLOSSOM ARBITRAGE, LLC.

Movant,

-vs-

JILL WHITTLE, KATHLEEN A. LEAVITT,
CHAPTER 13 TRUSTEE,

Respondents

Case No.: 10-30897-BAM
Chapter: 13

MOTION TO MODIFY OR TERMINATE THE
AUTOMATIC STAY UNDER 11 USC §362
TO PERMIT SECURED CREDITOR TO
RECOVER POSSESSION OF REAL
PROPERTY

Hearing Date: January 4, 2011
Hearing Time: 1:30 p.m.

COMES NOW, Movant Apple Blossom Arbitrage, LLC, by and through its legal counsel, Edgar C. Smith, Esq., and moves the court for an order permitting relief from the automatic stay under 11 USC §362(d)(1) and §362(d)(2) to allow them to proceed with a state court action to recover possession of the premises and property located at 646 Paloma Drive, Boulder City, Nevada 89005 ("Subject Property") (A.P.N. #186-10-117-016) based upon movant obtaining title to the property at a non-judicial foreclosure sale.

This motion is based upon the accompanying notice, the memorandum of points and authorities attached hereto, the 362 information sheet attached hereto, such matters as may be

1 judicially noticed, and further evidence as presented at the hearing on this matter.

2 Dated: December 2, 2010

LAW OFFICE OF EDGAR C. SMITH

3
4 By: /s/ Edgar C. Smith, Esq.
5 Edgar C. Smith, Esq.
6 State Bar No. 5506
7 7371 Prairie Falcon Road
8 Suite 120
Las Vegas, Nevada 89128
Attorney for Secured Creditor
Apple Blossom Arbitrage, LLC

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. INTRODUCTION**

11 Apple Blossom Arbitrage, LLC ("Movant") request the court to terminate the automatic stay as
12 to 646 Paloma Drive, Boulder City, Nevada 89005 (A.P.N. #186-10-117-016) to permit Movant to
13 recover possession of these premises. Movant acquired the property at a publicly noticed non-judicial
14 foreclosure sale on July 21, 2010. The Trustee's Deed Upon Sale was recorded July 23, 2010.
15 (Exhibit A hereto) Debtor has no equity in the property or even a right to possession of the premises
16 and therefore cause exists to grant relief from the automatic stay to permit the Movant to recover
17 possession.

18 **II. FACT BACKGROUND**

- 19 1. Movant is the legal owner of the premises commonly known as 646 Paloma Drive, Boulder
20 City, Nevada 89005 (A.P.N. #186-10-117-016) ("subject property") pursuant to a trustee's
21 deed upon sale issued by Executive Trustee Services, Inc. on or about November 5, 2010,
22 following a non-judicial foreclosure sale conducted on October 25, 2010. The trustee's deed
23 upon sale has been duly recorded in the official records of Clark County, Nevada on November
24 12, 2010 in Book 20101112 as instrument number 0005050. A true and correct copy of the
25 trustee's deed upon sale is attached to this motion as Exhibit A.
- 26 2. Subsequent to the trustee's sale and issuance of the trustee's deed upon sale, Movant began the
27 unlawful detainer process to recover possession of the premises against the Debtor. Movant is
28 informed and believes Debtor was personally served with the three day notice to quit and

notice to tenant occupying foreclosed property on November 23, 2010. A copy of the notice and affidavit of service are attached as Exhibit B.

3. Counsel for the Movant was contacted by counsel for the debtor to notify of the bankruptcy filed under the name Whittle. The parties were unable to come to an agreement so as to avoid the necessity of this Motion.
4. Movants has incurred \$750.00 for attorney's fees and \$150.00 for costs in bringing this motion.

III. ARGUMENT

A. DEBTOR HAS NO EQUITY IN THE SUBJECT PROPERTY AND THE PROPERTY IS NOT PART OF THE BANKRUPTCY ESTATE, SO RELIEF SHOULD BE GRANTED TO ALLOW MOVANT TO RECOVER POSSESSION.

An interest in real property is perfected upon recordation of the deed. *In re Walker*, 861 F.2d 597, 600 (9th Cir. 1998) Movant obtained legal title in the subject property prior to commencement of this proceeding by virtue of the issuance of the trustee's deed upon sale. See, N.R.S. 107.080, subsection 5. Movant perfected their interest by recordation of the trustee's deed.

State law determines whether Debtor has an interest in the subject property. See, *In re Contractor's Equipment Supply Company*, 861 F.2d 241, 244 (9th Cir. 1998). Nevada law does not permit Debtor an equity of redemption from a trustee's deed issued pursuant to a non-judicial foreclosure sale. See, N.R.S. 107.080 subsection 5. Instead, Nevada law permits Movant to evict Debtor following foreclosure and service of a 3 day notice. See, N.R.S. § 40.255. Accordingly, Movant holds legal title to the subject property, and Debtor has only bare possession, with no legal right to continue in possession of the subject property.

The automatic stay of section 362(a) protects only the debtor, property of the debtor, or property of the estate. See, *In re Casquil of Nevada, Inc.*, 22 B.R. 65, 66 (9th Cir. BAP 1982). This property is not the property of the Debtor or the property of the estate, and no purpose is served by protecting Debtor from being dispossessed of the property.

While Debtor has not commenced any adversary proceeding, the Debtor cannot maintain any claim because she cannot demonstrate that a bona fide purchaser of the subject property, as of the time of the

1 commencement of this case, would prevail against Movant. See, *LR Partners LLC v. Steiner*, 251 B.R.
2 137, 140-141 (Bankr. Ariz. 2000). While the Bankruptcy Code gives the trustee the status of a bona fide
3 purchaser, it is state law that defines whether a bona fide purchaser could even exist. See, *Washburn &*
4 *Roberts, Inc. v. Park East (In Re Washburn & Roberts)*, 795 F.2d 870, 872 (9th Cir. 1986). No bona fide
5 purchaser could exist in this case, as recordation of the notice of breach, notice of sale, and trustee's deed
6 upon sale imparts notice to Debtor and others of Movant's interest in the property. See, N.R.S.
7 §§111.320, 247.190.

8 Debtor lacks the power to avoid the transfer of title under 11 U.S.C. §544(b) as a preference. See, *In*
9 *re Ehring*, 900 F.2d 184 (9th Cir. 1990) (purchase of property by foreclosing creditor at non-collusive,
10 non-judicial foreclosure sale for balance of debt is not avoidable as preference since creditor did not
11 receive more than it would have received in liquidation).

12 "Cause" has been found to exist to grant the trustee the right to issue a trustee's deed following a pre-
13 petition foreclosure sale." See, *In re Flowers*, 94 B.R. 3, 8 (Bankr. D.Col. 1988). A purchaser is entitled
14 to relief from the automatic stay to evict the debtor where the debtor is unable to cure the mortgage
15 delinquency because the debtor's right to cure the mortgage delinquency was terminated by the sheriff's
16 sale. See, *In re Shields*, 148 B.R. 783 (Bankr. E.D. Pa. 1993).

17 The Debtor in this case has no legal or equitable right, title or interest in the subject property, so
18 the Debtor has no equity in the property.

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Wherefore, Movant prays for an order as follows:

A. That Movant be granted relief from the automatic stay to permit Movant, their successors and assigns, to pursue the state law remedies afforded them to recover possession of the subject property;

B. For costs and attorney's fees in the amount of \$900.00;

C. For an Order that Bankruptcy Rule 4001(a)(3) is waived, and that the Order shall take immediate effect upon signature by the Court.

Dated: December 2, 2010

LAW OFFICE OF EDGAR C. SMITH

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